IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979
No. 79-37

COVERT MARINE, INC. et al.,
Petitioners,

-VS-

OUTBOARD MARINE CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Respondent believes that the proper question presented by the Petition, of necessity because of the posture of the suit, is:

Did the Seventh Circuit Court of Appeals properly find that the District Court had not abused its discretion in denying the Petitioner-Wholesalers' and the Petitioner-Retailers' motion for a preliminary injunction?

STATEMENT OF THE CASE

Certain further aspects of the case should be presented.

Prior to the hearing in the District Court on the motion for preliminary injunction, Respondent filed a "Motion for Dismissal—As to All Plaintiffs—Under Doctrine of Res Judicata, Estoppel and Rule 65(d), FRCP" (herein called "Motion for Dismissal").

As to the Petitioner-Wholesalers, the basis for the Motion for Dismissal was that they had entered into a Final Judgment with Respondent approximately five years prior to the commencement of this lawsuit in an earlier antitrust case commenced by such Petitioner-Wholesalers against Respondent in the District Court involved in this lawsuit. The earlier case—*Covert Marine, Inc., et al* v *Outboard Marine Corporation, et al.*, Civil Action No. 71-F-104—is herein called "Covert I".

The Covert I Final Judgment provides:

> "The term of the OMC Parts and Accessories Distributor Agreement between each plaintiff and defendant Outboard Marine Corporation . . . shall be extended to September 30, 1978 . . . and each such Agreement shall thereupon terminate and be of no further force and effect and defendant Outboard Marine Corporation shall have no further obligation

to deal with any plaintiff." (Article III, Final Judgment; Pet. A.63);

"Upon termination of each Agreement, Outboard Marine Corporation shall repurchase and each plaintiff shall sell to Outboard Marine Corporation . . . such new saleable OMC products, parts and accessories as are covered by such Agreement as said plaintiff may have on hand . . ." (Article IV, Final Judgment; Pet. A.63);

"Except as expressly provided herein, each and every claim asserted in the Complaint is hereby dismissed with prejudice." (Article VIII, Final Judgment; Pet. A.64).

On July 30, 1979 the Motion for Dismissal was granted by the District Court as to Petitioner-Wholesalers.

With respect to Petitioners' claim in the lower courts and in its Petition herein that Respondent is violating Sections 1 and 2 of the Sherman Act by seeking a competitive advantage in the sale of marine accessories to marine retail dealers, Respondent pointed out to both the District Court and the Court of Appeals that Paragraph 42 of the Covert I complaint alleged that Respondent violated Section 2 of the Sherman Act by attempting to monopolize and monopolizing:

"(f) The distribution of accessories manufactured by defendant for use with its marine engines;

(g) the distribution of accessories designed for use with marine engines manufactured by defendant;

(h) the distribution of accessories designed for use with all marine engines;

* * *

(k) the manufacturing and sale of accessories designed for use with marine engines manufactured by defendant;

(l) the manufacturing and sale of accessories designed for use with all marine engines."

It was also pointed out that Paragraph 47 of the Covert I complaint alleged a conspiracy to restrain and monopolize those parts of trade and commerce set forth in paragraph 42(f)-(h), (k) and (l) of the complaint, in violation of Sections 1 and 2 of the Sherman Act. The District Court found that Covert I involved the distribution of marine accessories (Pet. A. 15).

Respondent also noted to the Court of Appeals, by quoting an excerpt from Petitioner-Wholesalers' preliminary injunction brief in Covert I, that the claim of competitive advantage as to marine accessories was presented in Covert I.

Further the District Court determined that Respondent has not pressured and cannot pressure its dealers with respect to the purchase of marine accessories (Pet. A.10-12); that Respondent's share of the accessories market is only 2.6% (Pet. A.12); that any attempt by Respondent to force its dealers to buy marine accessories from Respondent would be defeated because the dealers would likely switch to competitive outboard brands (Pet. A.10 & 11); and that the marine accessories market is "highly competitive" and dealers would continue to buy as they do now, shopping for the best prices, terms and services (Pet. A.12).

The District Court found that there was no evidence of immediate and irreparable injury to Petitioner-Retailers (Pet. A.13) and that Petitioner-Retailers failed to show they have no adequate remedy at law (Pet. A.14). As to the Petitioner-Wholesalers, the District Court found that they had no likelihood of success on the merits and were not irreparably harmed primarily because they are bound by the Final Judgment which was entered in Covert I (Pet. A.14-21).

The Court of Appeals upheld the District Court, stating that the findings of the District Court were not clearly

erroneous and that the District Court had not committed an abuse of discretion (Pet. A.2). The Court of Appeals also noted that there was a likelihood the Petitioner-Wholesalers would be barred by res judicata and that the Petitioner-Retailers had failed to demonstrate either irreparable harm or likelihood of success on the merits (Pet. A.2).

In ending, certain significant misstatements in the Petition should be noted. The Petition at several places asserts that Respondent has monopoly power in its outboard motor parts. The record not only fails to establish this assertion, but disproves it. Petitioners also overstate Respondent's market position in outboard motors. That position, as shown by the record, is currently about 50%. Lastly, the Petition claims that all 12,000 marine dealers need Respondent's outboard motor parts to be viable. According to the record, this is true only with respect to Respondent's Johnson and Evinrude dealers. They now number approximately 5,000.

ARGUMENT

Lack of Jurisdiction

The Petition seeks review of the denial by the lower courts of Petitioners' motion for preliminary injunction. Petitioners have not demonstrated in their Petition any special and important reason why the decisions below should be reviewed by this Court, as required by Rule 19 of the Supreme Court Rules. Indeed, it is difficult to conceive of a case more extreme than this one wherein the criteria of Rule 19 have not been met.

The prerequisites for issuance of a preliminary injunction and the rule that the burden of proof is on the moving party were discussed in *Fox Valley Harvestore, Inc.* v *A. O. Smith Harvestore Products, Inc.*, 545 F2d 1096 (7th Cir 1976) at 1097. The Seventh Circuit said:

> "The grant of a preliminary injunction is the exercise of an extremely far reaching power not to be indulged in except in a case clearly warranting it. . . . The discretion exercised by the district court is measured against several prerequisites: (1) the plaintiffs have no adequate remedy at law and will be irreparably harmed if the injunction does not issue; (2) the threatened injury to the plaintiffs outweighs the threatened harm the injunction may inflict on the defendant; (3) the plaintiffs have at least a reasonable likelihood of success on the merits; and (4) the granting of a preliminary injunction will not disserve the public interest. . . . A preliminary injunction is an extraordinary remedy which is not available unless the plaintiffs carry their burden on persuasion as to all of the prerequisites."

Petitioners' sole contention is that the Court of Appeals decision that Petitioner-Wholesalers are not entitled to a preliminary injunction "because of the likelihood that [they] will be barred by res judicata" is in conflict with *Lawlor* v *National Screen Services Corporation*, 349 US 322, 99 LEd 1122, 75 S Ct 865 (1955). Assuming arguendo that such contention is correct, the fact remains that there are other reasons for upholding the decisions below.

Petitioners claim that Respondent is violating Sections 1 and 2 of the Sherman Act because Respondent will gain a competitive advantage in the sale of marine accessories to marine dealers by becoming the only distributor of its outboard motor parts in the United States east of the Rocky Mountains. The District Court, however, found that there was no likelihood of success on the merits of that claim. Specifically, the District Court found that Respondent cannot and will not coerce, either expressly or impliedly, its dealers in the purchase of any marine accessories (Pet. A.10-14). Patently, that finding applies to both the Petitioner-Wholesalers and the Petitioner-Retailers.

Petitioners have not challenged the above finding in their Petition. Clearly, the denial of the preliminary injunction stands, regardless of the *Lawlor* argument advanced by Petitioners.

Res Judicata

Petitioners read *Lawlor* v *National Screen Services Corporation*, 349 US 322, 99 LEd 1122, 75 S Ct 865 (1955), as holding that conduct subsequent to a judgment is excluded from the res judicata bar of that judgment.

They then assert, in effect, that Respondent's termination of the Petitioner-Wholesalers on September 30, 1978 constituted subsequent conduct within the meaning of *Lawlor*. (See pages 12 and 14 of Petitioners' Brief and, particularly, the prayers in their motion for preliminary injunction set forth at pages 6 and 7 of said Brief.) This is nonsense.

Such "subsequent conduct" was not only envisioned but also mandated in the Covert I Final Judgment. Such Judgment specifically provides that the business relationships between the Petitioner-Wholesalers and Respondent shall terminate on September 30, 1978 and, thereafter, Respondent shall have no further obligation to deal with any Petitioner-Wholesaler. Further, such Judgment requires each Petitioner-Wholesaler to sell to Respondent such new saleable products of Respondent which the Petitioner-Wholesaler has on hand on September 30, 1978. Such Judgment differs from the *Lawlor* judgment in these critical respects. In short, the terminations of which Petitioners complain were the essence of the Covert I Final Judgment and, in fact and in law, cannot be subsequent conduct within the meaning of *Lawlor*. Such terminations did not post-date the Covert I Final Judgment but rather constituted enforcement of its terms.

The contorted argument of Petitioners reveals this suit as but an attack on, and an attempt to nullify and void, the Covert I Final Judgment.

Additionally, *Lawlor* was fully disposed of below. *Lawlor* involved new antitrust violations—deliberately slow deliveries and tie-in sales, among others—and an increase in defendants' control over the market. These were claims which did not exist and could not be sued upon at the time of

the earlier judgment. Accordingly, a new cause of action arose. After thorough analysis, the District Court found that *Lawlor* was factually distinguishable (Pet. A.18 & 19). This finding, too, is unchallenged by Petitioners. Having distinguished *Lawlor*, the District Court further found that the claim of the Petitioner-Wholesalers in this case is exactly the same claim, the same cause of action, involved in Covert I (Pet. A.19 & 20). The claim in both cases is that Respondent will gain an advantage in the sale of marine accessories by becoming the sole distributor of its parts.

Clearly, there is nothing in the decisions below which is contrary to *Lawlor*.

CONCLUSION

The Petition of Writ of Certiorari should be denied.

Respectfully submitted,
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